IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 10, 2004 Session

ROBERT BEAN ET AL. v. PHIL BREDESEN ET AL.

Appeal from the Chancery Court for Davidson County
No. 91-2558-I Irvin H. Kilcrease, Jr., Chancellor

No. M2003-01665-COA-R3-CV - Filed May 2, 2005

This is the third appeal in a long-running dispute involving the constitutionality of Tennessee's statutory ban on the private possession of white-tailed deer. Persons challenging the ban filed suit in the Chancery Court for Davidson County asserting that the statutes regulating the possession of exotic animals unlawfully delegated legislative authority to the Tennessee Wildlife Resources Agency, were vague and overbroad, and violated the Commerce Clause of the United States Constitution. Both the trial court and this court initially determined that the statutes unlawfully delegated legislative authority to the Tennessee Wildlife Resources Agency. After the Tennessee Supreme Court reversed these decisions in *Bean v. McWherter*, 953 S.W.2d 197 (Tenn. 1997), the trial court granted the defendants' motion for summary judgment on the vagueness and overbreadth and the Commerce Clause claims. We reversed the dismissal of the Commerce Clause claim and remanded the case for a hearing on whether the statutory ban on the private possession of white-tailed deer placed an undue burden on interstate commerce. *Bean v. McWherter*, 24 S.W.3d 325 (Tenn. Ct. App. 1999). Following another hearing, the trial court concluded that the ban did not place an undue burden on interstate commerce. The plaintiffs have appealed. We have determined that the evidence supports the trial court's conclusion that Tennessee's interest in protecting its indigenous white-tailed deer population outweighs the statutory ban's effect on interstate commerce. Accordingly, we affirm the judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

F. Clay Bailey, Nashville, Tennessee, for the appellants, Robert Bean, Franklin Shaffer, David Autrey, and Mack Roberts.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; and Elizabeth P. McCarter, Senior Counsel, Nashville, Tennessee, for the appellees, Phil Bredesen, Governor; Paul G. Summers, Attorney General and Reporter; Tennessee Wildlife Resources Commission; and Gary T. Myers, Director, Wildlife Resources Agency.

OPINION

I.

In 1991, the Tennessee General Assembly revised the statutes governing the possession, sale, propagation, and transfer of "exotic animals" in Tennessee.[1] The new statutes classified exotic animals into five classes, prescribe requirements for their purchase, possession, transportation, and release, and define the liability for damage caused by escaped animals and for other statutory violations. They also granted limited authority to the Tennessee Wildlife Resources Agency ("TWRA") to add and delete animals from some of the classifications. The new regulatory scheme took effect on June 25, 1991.

With regard to the classifications most relevant to the issues in this case, Class III consists of animals, including some native species,[2] that may be possessed without a TWRA permit.[3] White-tailed deer and wild elk are specifically excluded from this classification.[4] However, elk obtained from a "legal source" held in captivity for the purpose of farming are included in Class III.[5] Class II includes all native species that are not listed in other classes.[6] These animals may be personally possessed and propagated after obtaining a TWRA permit.[7] Finally, Class IV includes native species that may be possessed only by zoos, temporary exhibitors, and rehabilitation facilities.[8] White-tailed deer are expressly included in Class IV,[9] and the TWRA does not have the statutory authority to promulgate rules to add or delete any animals from this classification.

In August 1991, Robert Bean, Franklin Shaffer, David Autrey, Mack Roberts, and others filed a declaratory judgment action in the Chancery Court for Davidson County challenging the constitutionality of the 1991 statutes. Approximately six months later, they changed lawyers and filed their first amended complaint against the Governor, the Attorney General and Reporter, and the

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[1] Act of May 30, 1991, ch. 487, 1991 Tenn. Pub. Acts 832 (codified as Tenn. Code Ann. §§ 70-4-401 to -416 (2004)).

[2] Tenn. Code Ann. § 70-4-402(7) defines "native wildlife" as "those species presently occurring in the wild in Tennessee and those extirpated species that could reasonably be expected to survive in the wild if reintroduced."

[3] Tenn. Code Ann. § 70-4-403(3).

[4] Tenn. Code Ann. § 70-4-403(3)(P).

[5] Tenn. Code Ann. § 70-4-403(3)(P).

[6] Tenn. Code Ann. § 70-4-403(2).

[7] Tenn. Code Ann. § 70-4-404(d)(1)(B), (d)(4).

[8] Tenn. Code Ann. § 70-4-403(4).

[9] Tenn. Code Ann. § 70-4-403(4)(B).

TWRA and its director ("TWRA Defendants").[10] This complaint contained more specific averments regarding the regulated activities in which each of the plaintiffs was engaged[11] and asserted that the statutory scheme was unconstitutional because its provisions were vague and overbroad and it placed an undue burden on interstate commerce. In December 1993, the parties challenging the statutes amended their complaint to add a claim that the TWRA's rule-making power to add or remove animals from some of the classes was an unlawful delegation of legislative authority. Sometime later, the plaintiffs amended their complaint yet again to specifically challenge the inclusion of white-tailed deer in Class IV.[12]

The TWRA Defendants moved for a summary judgment in January 1994. Approximately eighteen months later, the trial court denied the summary judgment motion and concluded that the delegation to the TWRA of the authority to add or remove species from the statutory classes was an unconstitutional delegation of legislative authority because the legislature did not provide standards for making these decisions. This court affirmed the trial court's decision, *Bean v. McWherter*, No. 01A01-9510-CH-00431, 1996 WL 82666 (Tenn. Ct. App. Feb 28, 1996); however, the Tennessee Supreme Court reversed, finding that the statutes contained sufficient standards to guide the TWRA's decisions. *Bean v. McWherter*, 953 S.W.2d at 200.

On remand, the TWRA Defendants renewed their summary judgment motion with regard to the vagueness and overbreadth and Commerce Clause claims. The trial court granted the summary judgment motion in December 1998, and the plaintiffs appealed. On this occasion, this court affirmed the trial court's conclusion that the 1991 statutory scheme was not vague and overbroad. However, we vacated the summary judgment with regard to the Commerce Clause claim and remanded the case to the trial court to address the factual question of whether Tenn. Code Ann. § 70-4-403(4)(B)'s ban on private possession of white-tailed deer imposes an undue burden on interstate commerce. *Bean v. McWherter*, 24 S.W.3d at 332.

The trial court conducted a bench trial in March 2003. For the first time in this protracted litigation, the State undertook to defend Tenn. Code Ann. § 70-4-403(4)(B) as the only available means to protect Tennessee's indigenous white-tailed deer from the spread of Chronic Wasting Disease ("CWD"), a fatal, transmissible disease of the central nervous system found in white-tailed deer, mule deer, and Rocky Mountain elk. Even though the State had offered other justifications for Tenn. Code Ann. § 70-4-403(4)(B) at earlier hearings, the March 2003 hearing focused almost completely on the epidemiology of CWD, the Tennessee Department of Agriculture's rules

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[10] In accordance with Tenn. R. App. P. 19(c), Governor Phil Bredesen has been substituted as a party plaintiff in the place of former Governor Ned Ray McWherter, and Attorney General Paul G. Summers has been substituted in the place of former Attorney General Charles W. Burson.

[11] Mr. Bean alleged that he was a Tennessee resident who was a licensed propagator and dealer of cougars, leopards, squirrels, and prairie dogs. Messrs. Shaffer and Roberts alleged that they were Tennessee residents who owned and possessed cougars for sale to third parties. Mr. Autrey alleged that he was a Tennessee resident who owned cougars, zebras, buffaloes, imported deer, and other animals.

[12] As far as the pleadings and the appellate record in this case show, Mr. Autrey is the only plaintiff who possesses white-tailed deer.

restricting the importation of deer and elk to prevent the spread of CWD, and the TWRA's program to reintroduce elk in East Tennessee.[13]

The trial court filed a memorandum opinion in May 2003, concluding that any burden on interstate commerce resulting from the ban on the personal possession of white-tailed deer operated evenhandedly and was relatively slight compared to the state's interest in protecting the health and safety of its indigenous white-tailed deer. It also held that there were no less restrictive means to effectuate the state's interests. The parties challenging Tenn. Code Ann. § 70-4-403(4)(B) have again appealed.

II.
CHRONIC WASTING DISEASE AND TENNESSEE'S INTEREST IN PROTECTING INDIGENOUS WHITE-TAILED DEER FROM CONTRACTING IT

The constitutionality of Tenn. Code Ann. § 70-4-403(4)(B)'s prohibition on the private possession of white-tailed deer stands or falls on the legitimacy and strength of the State's interest in preventing the spread of CWD to its indigenous white-tailed deer population and on the efficacy of the means the State has chosen to provide this protection. Accordingly, an analysis of the Commerce Clause issues raised in this case must begin with an understanding of what CWD is and the threat it poses to Tennessee's indigenous white-tailed deer.

CWD is a fatal, transmissible disease that affects only white-tailed deer, mule deer, and Rocky Mountain elk.[14] It is classified as a transmissible spongiform encephalopathy ("TSE"); other TSEs include bovine spongiform encephalopathy ("mad cow disease"),[15] scrapie in sheep and goats,[16] and Creutzfeldt-Jakob disease in humans.[17] CWD is found in both wild and farmed deer and

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[13]The State's pleadings indicate that it had undertaken to justify Tenn. Code Ann. § 70-4-403(4)(B) on other grounds in earlier proceedings. In addition to concerns about the spread of diseases other than CWD, the State had raised (1) safety issues surrounding raising domesticated white-tailed deer, (2) concerns about deer poaching and the creation of an illegal market in wild white-tailed deer, and (3) concerns about the overpopulation of white-tailed deer if fewer wild deer were hunted. While evidence regarding these matters may have been presented during earlier hearings, no such evidence was introduced during the March 2003 hearing. Because the records of the earlier proceedings are not part of this record, we cannot now rely on any of the evidence introduced during these hearings except for the facts reflected in our opinions and the Tennessee Supreme Court's opinion.

[14]*Hagener v. Wallace*, 47 P.3d 847, 852 n.1 (Mont. 2002), *rev'd on other grounds*, *Shammel v. Canyon Res. Corp.*, 82 P.2d 912 (Mont. 2003); Mo D. Salman, *Chronic Wasting Disease in Deer and Elk: Scientific Facts and Findings*, 2003 J. Vet. Med. Sci. 65(7), 761-68 [hereinafter Salman].

[15]*Baur v. Veneman*, 352 F.2d 625, 627 n.1 (2d Cir. 2003).

[16]Michael W. Miller et al., *Environmental Sources of Prion Transmission in Mule Deer*, 10 Emerging Infectious Diseases 6, 1003-06 (June 2004), *at* http://www.cdc.gov/eid [hereinafter Miller].

[17]Ermias D. Belay et al., *Chronic Wasting Disease and Potential Transmission to Humans*, 10 Emerging Infectious Diseases 6, 977-84 (June 2004), *at* http://www.cdc.gov/eid (stating that there is little risk that CWD can be transferred to humans) [hereinafter Belay].

elk.[18] It was first discovered in Colorado in 1960[19] and has since been found in South Dakota, Nebraska, Illinois, Utah, Wisconsin, Minnesota, New Mexico, Kansas, Oklahoma, and Montana. Outside of the United States, CWD has been found in the Canadian provinces of Saskatchewan and Alberta, as well as in South Korea due to an exportation of elk from a Saskatchewan farm.[20]

Little is known about the origin and causal agent of CWD.[21] Scientists speculate whether CWD originated from a new infectious agent, an adapted strain of scrapie, a genetic abnormality, or a spontaneous conformational alteration of normal cells.[22] The most prevalent theory is that CWD is caused by proteins called prions. Prions are found naturally in the cells of the nervous system and other body tissues. In an animal infected with CWD, the prions take on an abnormal form resistant to enzymes that break down normal proteins. As a result, these abnormal prions accumulate in the animal's brain and lymphoid tissues, eventually causing the formation of holes in the tissues.[23]

CWD is always fatal. There is no known treatment or vaccine. Animals infected with CWD exhibit altered behavior, loss of body condition, excessive salivation, and eventual death,[24] sometimes from aspiration pneumonia.[25] CWD has a long incubation period, with clinical signs appearing only a few weeks to several months before the animal dies.[26]

Very little is known about how CWD is transmitted. It appears that animals can contract the disease either through direct or indirect contact with an infected animal, although it is unclear when and how infected animals shed disease-causing prions into the environment. Scientists do know that prions have remarkable persistence in the environment and that they resist all conventional treatments used to kill or inactivate infectious agents.[27] Recent studies show that where infected

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[18] APHIS Veterinary Services ("APHIS"), *Questions and Answers about Chronic Wasting Disease* (Sept. 2002), *available at* http://www.aphis.usda.gov/lpa/pubs/fsheet_faq_notice/faq_ahcwd.pdf [hereinafter APHIS].

[19] Belay, 10 Emerging Infectious Diseases 6 at 977.

[20] Sarah Kahn, *Chronic Wasting Disease in Canada: Part 1*, 45 Can.Vet J. 397, 397-404 (May 2004) [hereinafter Kahn].

[21] *See* Kahn, 45 Can.Vet J. at 398; APHIS, *available at* http://www.aphis.usda.gov/lpa/pubs/fsheet_faq_notice/faq_ahcwd.pdf.

[22] Kahn, 45 Can.Vet J. at 398.

[23] APHIS, *available at* http://www.aphis.usda.gov/lpa/pubs/fsheet_faq_notice/faq_ahcwd.pdf.

[24] APHIS, *available at* http://www.aphis.usda.gov/lpa/pubs/fsheet_faq_notice/faq_ahcwd.pdf.

[25] Belay, 10 Emerging Infectious Diseases 6 at 977.

[26] APHIS, *available at* http://www.aphis.usda.gov/lpa/pubs/fsheet_faq_notice/faq_ahcwd.pdf.

[27] Trent Bollinger et al., *Chronic Wasting Disease in Canadian Wildlife: An Expert Opinion on the Epidemiology and Risks to Wild Deer*, Canadian Cooperative Wildlife Health Centre, July 2004, *available at* http://wildlife1.usask.ca/ccwhc2003/other_publications.php [hereinafter Bollinger].

animals reside, abnormal prions shed by the animals can persist in the environment for many years and infect other animals who later pass through the area.[28]

Although little is known or understood about CWD, scientists appear to agree that captivity of elk and deer facilitates the transmission of the disease.[29] Because CWD is readily transmitted among captive deer and elk concentrated in pens, it is believed that transmission is facilitated by the concentration of animals related to artificial feeding and baiting.[30] Furthermore, some scientists believe that the commercial transportation of deer and elk aid in introducing CWD to new areas.[31] One of the difficulties in preventing the spread of CWD while transporting white-tailed deer in particular is that they cannot be tested for CWD while they are alive.[32] The only test available to determine whether a non-symptomatic white-tailed deer is carrying CWD is a post mortem examination of the brain and lymphoid tissues.[33]

The currently available information about CWD leaves little room for doubt that it poses a significant threat to white-tailed dear, both in captivity and in the wild. The State has an interest in conserving and protecting its wildlife that is similar to its interest in protecting the health and safety of its citizens. *Hughes v. Oklahoma*, 441 U.S. 322, 337, 99 S. Ct. 1727, 1737 (1979); *Pac. N.W. Venison Producers v. Smitch*, 20 F.3d 1008, 1013 (9th Cir. 1994). The legitimacy and strength of this interest is not undermined by the inability of the experts testifying at the March 2003 hearing to agree on how CWD is transmitted or the susceptibility of various species of deer and elk to contracting CWD.

When faced with a threat such as CWD, the states are not required to wait until potentially irreversible damage has occurred or until the scientific community agrees on precisely how CWD is transmitted. The State has a legitimate interest in guarding against imperfectly understood environmental risks. *Maine v. Taylor*, 477 U.S. 131, 148, 106 S. Ct. 2440, 2452 (1986); *see also Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465, 489, 8 S. Ct. 689, 700 (1888) ("states have [the]

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[28] *See* Miller, 10 Emerging Infectious Diseases 6, 1003-06; Ronald W. Opsahl, Comment, *Chronic Wasting Disease of Deer and Elk: A Call for National Management*, 33 Envtl. L. 1059, 1073-74 (2003) [hereinafter Opsahl].

[29] Salman, 2003 J. Vet. Med. Sci 65(7) at 761; Belay, 10 Emerging Infectious Diseases 6 at 977; Bollinger, *available at* http://wildlife1.usask.ca/ccwhc2003/other_publications.php; Michael W. Miller, *Horizontal Prion Transmission in Mule Deer*, 425 Nature 35 (September 2003), *available at* http://www.nature.com/nature [hereinafter Miller II]; Kahn, 45 Can. Vet J. at 397; APHIS, *available at* http://www.aphis. usda.gov/lpa/pubs/fsheet_faq_notice/ faq_ahcwd.pdf.

[30] Bollinger, *available at* http://wildlife1.usask.ca/ccwhc2003/other_publications.php.

[31] Bollinger, *available at* http://wildlife1.usask.ca/ccwhc2003/other_publications.php ("[H]uman activities, particularly translocation of captive and free-ranging animals, have resulted in CWD range expansions, and once established, the disease may be maintained through environmental contamination for an unknown period of time."); Opsahl, 33 Envtl. L. at 1089 ("Although debate remains concerning the spread of CWD via live animal translocation, it is certain that a significant risk for CWD introduction exists in live animal movement.").

[32] *Hagener v. Wallace*, 47 P.3d at 853; Miller II, 425 Nature at 35.

[33] Miller II, 425 Nature at 35.

power to provide by law suitable measures to prevent the introduction into the states of articles of trade which, on account of their existing condition, would bring in and spread disease, pestilence, and death."). Accordingly, Tennessee has a legitimate interest in preventing the spread of CWD to its indigenous white-tailed deer population.

III.
TENN. CODE ANN. § 70-4-403(4)(B)'S CONFORMITY WITH THE COMMERCE CLAUSE

The parties challenging the constitutionality of Tenn. Code Ann. § 70-4-403(4)(B) take issue with the trial court's conclusion that the statute does not discriminate against interstate commerce and its conclusion that the statute's burden on interstate commerce is not clearly disproportionate in relation to its local benefits. We have determined that the statute, both on its face and as applied, does not discriminate against interstate commerce. We have also determined that the parties challenging the statute have failed to prove that its effects on interstate commerce are clearly excessive in relation to its benefits to Tennesseans.

A.

The Commerce Clause of the United States Constitution provides that "[t]he Congress shall have power . . . [t]o regulate commerce . . . among the several states . . .." U.S. Const. art. I, § 8, cl. 3. It embodies not only an affirmative grant of authority to Congress but also a limitation on the power of the states to regulate commerce, even in the absence of federal regulation. The Commerce Clause's limitation on the state's power over commerce is commonly referred to as the "negative aspect" of the Commerce Clause.[34] It prohibits economic protectionism by denying the states the power to discriminate against or burden the interstate flow of commerce unjustifiably. *Wyoming v. Oklahoma*, 502 U.S. 437, 454, 112 S. Ct. 789, 800 (1992); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273-74, 108 S. Ct. 1803, 1807 (1988).

Evaluating whether a state or local regulatory measure is consistent with the negative aspect of the Commerce Clause requires a two-step analysis. The first step is to determine whether the

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[34] Alexander Hamilton explained the principal reason for the negative aspect of the Commerce Clause as follows:

> The interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

THE FEDERALIST No. 22, at 135 (Easton Press 1979) (A. Hamilton). James Madison, who viewed the negative aspect of the Commerce Clause as the more important provision, likewise explained that it "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against the injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government." 3 MAX FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 478 (1911); *see also* James Madison, *Vices in the Political System of the United States*, in 2 WRITINGS OF JAMES MADISON, at 362-63 (Gaillard Hunt ed. 1901).

measure discriminates against interstate commerce or whether it regulates evenhandedly with only "incidental" effects on interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 322, 336, 99 S. Ct. 1727, 1736 (1979). In this context, discrimination means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envt'l Quality*, 511 U.S. 93, 99, 114 S. Ct. 1345, 1350 (1994). Regulatory measures that discriminate against interstate commerce, either on their face or in practical effect, are virtually per se invalid. *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331, 116 S. Ct. 848, 854 (1996); *Wyoming v. Oklahoma*, 502 U.S. at 454-55, 112 S. Ct. at 800; *see also Maine v. Taylor*, 477 U.S. 131, 148 n.19, 106 S. Ct. 2440, 2453 n.19 (1986) (reviewing the types of regulatory measures that have been found to be discriminatory).

Regulatory measures that discriminate against interstate commerce, either on their face or in practical effect, are subject to strict judicial scrutiny. They will be upheld only if they serve a legitimate local purpose unrelated to economic protectionism and if this purpose cannot be served as well by other reasonably available non-discriminatory means. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392, 114 S. Ct. 1677, 1683 (1994); *Maine v. Taylor*, 477 U.S. at 138, 106 S. Ct. at 2447. There is a strong presumption against regulatory measures that discriminate against interstate commerce, *New Energy Co. of Ind. v. Limbach*, 486 U.S. at 278, 108 S. Ct. at 1810, and the burden of proof is on the government to demonstrate that the law is the only means available to advance its legitimate local interest. *Fort Gratiot Sanitary Landfill v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 366, 112 S. Ct. 2019, 2027 (1992).

If a state or local regulatory measure does not discriminate and has only an "indirect" or "incidental" effect on interstate commerce, the courts move to the second step of the analysis which consists of the balancing test outlined in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S. Ct. 844, 847 (1970). When the regulatory measure is evenhanded, the court will first determine whether the state or local government's interest is legitimate and then will determine whether the burden the regulation imposes on interstate commerce is clearly excessive in relation to the local benefits. *Oregon Waste Sys., Inc. v. Dep't of Envt'l Quality*, 511 U.S. at 99, 114 S. Ct. at 1350; *Wyoming v. Oklahoma*, 502 U.S. at 455, n.12, 112 S. Ct. at 800 n.12. The extent of the burden that will be tolerated depends on the nature of the local interest involved and on whether this interest could be adequately protected by a regulatory measure with a lesser impact on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. at 142, 90 S. Ct. at 847. When a regulatory measure is not discriminatory, the person challenging the regulatory measure has the burden of demonstrating that its impact on interstate commerce is clearly excessive in relation to its local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. at 142, 90 S. Ct. at 847.

B.

The first issue we must address is whether Tenn. Code Ann. § 70-4-403(4)(B) discriminates against interstate commerce either on its face or in practical effect. While the dividing line between regulatory measures that are virtually invalid per se and those that are amenable to the *Pike v. Bruce Church, Inc.* balancing test can be exceedingly narrow, *Brown-Forman Distillers Crop. v. New York State Liquor Auth.*, 476 U.S. 573, 579, 106 S. Ct. 2080, 2084 (1986), this case is not close. Tenn. Code Ann. § 70-4-403(4)(B) clearly does not discriminate against interstate commerce.

Tenn. Code Ann. § 70-4-403(4)(B) is not an importation ban; it is a ban on private possession.[35] The statute makes no distinctions based on the origin of the white-tailed deer. It proscribes the possession of indigenous white-tailed deer in precisely the same way that it proscribes the possession of white-tailed deer from other states.

The statute's complete ban on the private possession of white-tailed deer undermines any notion that its purpose is to favor in-state interests over out-of-state interests. Tenn. Code Ann. § 70-4-403(4)(B) is plainly directed at the private possession of all white-tailed deer, not the interstate shipment of white-tailed deer. Similar evenhanded regulations designed to prevent the traffic in potentially dangerous or harmful items regardless of their origin have not been considered to be forbidden protectionist measures. *See Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 346-47, 112 S. Ct. 2009, 2016-17 (1992); *Guy v. City of Baltimore*, 100 U.S. 434, 443, 1879 WL 16579 (1879). Accordingly, we concur with the trial court's conclusion that Tenn. Code Ann. § 70-4-403(4)(B) does not discriminate against interstate commerce.

C.

Because Tenn. Code Ann. § 70-4-403(4)(B) regulates evenhandedly and does not discriminate against interstate commerce, the persons challenging its constitutionality have the burden of demonstrating either that the interests the State seeks to protect are not legitimate or that Tenn. Code Ann. § 70-4-403(4)(B)'s impact on interstate commerce is clearly excessive in relation to the local benefits to Tennessee. We have determined, based on the record available to us, that the persons challenging Tenn. Code Ann. § 70-4-403(4)(B) have not carried their burden.

We have already concluded that Tennessee has a legitimate interest in preventing the spread of CWD to its indigenous white-tailed deer population and that Tenn. Code Ann. § 70-4-403(4)(B) does not discriminate against interstate commerce. Thus, applying the balancing test in *Pike v. Bruce Church, Inc.*, the only remaining issue is whether Tenn. Code Ann. § 70-4-403(4)(B)'s effect on interstate commerce is clearly excessive in relation to its benefits to Tennessee. The extent of the burden that will be tolerated depends on the nature of the local interest involved and on whether this interest could be adequately protected by a regulatory measure with a lesser impact on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. at 142, 90 S. Ct. at 847.

Preventing the spread of CWD to Tennessee's indigenous white-tailed deer is an interest of the highest order. The Tennessee General Assembly's decision to ban the private possession of animals susceptible to CWD is reasonable, especially considering (1) that no cases of CWD in either

[35] Some courts have found the distinction between a ban on possession and a ban on importation to be significant with regard to the Commerce Clause analysis. The United States Court of Appeals for the Tenth Circuit determined that Wyoming's ban on private ownership of "big or trophy game animals" did not discriminate against interstate commerce but that its ban on the importation of these animals was discriminatory on its face. *Dorrance v. McCarthy*, 957 F.2d 761, 763, 765 (10th Cir. 1992). However, the United States Court of Appeals for the Ninth Circuit reached a different conclusion. The court held that an importation ban, coupled with a ban on private possession, does not discriminate against interstate commerce because it "adds nothing to the prohibitions that apply equally to in-state and out-of-state interests. . .." *Pac. N.W. Venison Producers v. Smitch*, 20 F.3d at 1012.

captive or wild animals have been reported in Tennessee[36] and (2) the plaintiff's failure to present any evidence that would support a finding of anything more than a minimal economic impact on interstate commerce.[37] *Pac. N.W. Venison Producers v. Smitch*, 20 F.3d at 1015. Determining how much risk to indigenous wildlife is acceptable is quintessentially a legislative determination, and the courts should decline to second-guess such legislative judgments when the evidence of the regulatory measure's effect on interstate commerce is so tenuous. *Pac. N.W. Venison Producers v. Smitch*, 20 F.3d at 1016. With so little understood about CWD and with such conflicting and inconclusive testimony from the parties' experts, we find no legitimate basis for this court to substitute our judgment for that of the General Assembly. The persons challenging Tenn. Code Ann. § 70-4-403(4)(B) have failed to demonstrate that the statute does not legitimately serve to prevent the spread of CWD into Tennessee.

The persons challenging Tenn. Code Ann. § 70-4-403(4)(B) also assert that regulatory options less burdensome than a complete ban on possession of white-tailed deer are currently available and that these options would enable Tennessee to protect its indigenous white-tailed deer from the spread of CWD just as effectively as Tenn. Code Ann. § 70-4-403(4)(B). Specifically, they point to the regulations promulgated by the Tennessee Department of Agriculture pertaining to the importation of CWD susceptible cervidae[38] and the fact that elk and mule deer have actually been imported into Tennessee under this regulation.

In April 2002, the Tennessee Department of Agriculture adopted emergency rules permitting the importation of cervidae into Tennessee subject to certain restrictions. These rules became permanent in October 2002. They require that cervidae imported into Tennessee must not come from a geographic area where CWD has been found, that the animals must have been part of a CWD surveillance program, and that the persons importing the cervidae must obtain entry permits prior to bringing the animals into the state. Tenn. Comp. R. & Regs. 0080-2-1-.12(3)(a), (b), (c).

The persons challenging Tenn. Code Ann. § 70-4-403(4)(B) make much of the fact that both elk and mule deer have been imported into Tennessee under the Department of Agriculture's rules even though these animals are susceptible to CWD. They argue that importing white-tailed deer in

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[36]Tennessee differs from Wyoming in this respect. The United States Court of Appeals for the Tenth Circuit reversed the summary judgment favoring Wyoming's ban on the possession of "big or trophy game animals" because the trial court had ignored the evidence that the diseases of concern to Wyoming also occurred in domestic animals that could be freely imported into the state and that wild animals could be tested for these diseases in the same manner that domestic animals are tested. *Dorrance v. McCarthy*, 957 F.2d at 764.

[37]The persons challenging Tenn. Code Ann. § 70-4-403(4)(B) offered no evidence regarding the actual economic impact of Tennessee's prohibition of the private possession of white-tailed deer. The evidence contains no evidence regarding (1) the economic value of a white-tailed deer, (2) the revenues that commercially raising deer in Tennessee could generate, or (3) the existing interstate market in white-tailed deer. All that the current record shows is that one of the current plaintiffs has kept an indeterminate number of white-tailed deer on one of his farms. This evidence does little to aid this court in determining the extent of Tenn. Code Ann. § 70-4-403(4)(B)'s effects on interstate commerce.

[38]Cervidae is a family of animals that includes deer, reindeer, moose, elk, and caribou. *See* Animal Diversity Web at the University of Michigan Museum of Zoology, *at* http://animaldiversity.ummz.umich.edu/site/accounts/information/cervidae.html.

compliance with these rules would be far less burdensome on interstate commerce than a complete ban on possession of white-tailed deer. Accordingly, they insist that the State should be required to permit them to import white-tailed deer into Tennessee as long as they comply with the Department of Agriculture's rules.

In order to discern whether the Department of Agriculture's rules present a less burdensome alternative to Tenn. Code Ann. § 70-4-403(4)(B), we must examine the basis for the State's decision to treat elk and mule deer differently than white-tailed deer. All three species are susceptible to CWD, and yet the State freely permits the importation of elk and mule deer into Tennessee. The Department of Agriculture promulgated its rules to address the obvious risks associated with the importation of elk and mule deer. If the importation of white-tailed deer presents the same amount of risk as elk and mule deer, it logically follows that white-tailed deer could likewise be safely imported into Tennessee as long as the rules have been followed.

The plaintiffs' argument is undermined by the evidence that the importation and possession of white-tailed deer originating outside Tennessee presents a far greater risk of the spread of CWD in Tennessee than the importation of elk or mule deer. The record provides two bases for this conclusion.

The first, and most significant basis, is the evidence that mule deer and elk can be tested for CWD before they are imported into Tennessee.[39] There is no similar test for white-tailed deer, which can be tested for the presence of CWD only by an autopsy following their death. The availability of a test for CWD that can be performed on live elk and mule deer makes their importation into Tennessee far safer than the importation of white-tailed deer for which there is currently no test that will confirm or rule out whether a live animal has contracted CWD. Thus, because there is no test currently available to detect CWD in live white-tailed deer, the State could appropriately ban the possession and importation of white-tailed deer until a test similar to the one used for mule deer and elk becomes available.[40]

The second basis for imposing a ban on the private possession of white-tailed deer and not on elk or mule deer is the number of white-tailed deer in Tennessee and their value to hunters and related businesses as an abundant natural resource. There are far more white-tailed deer in the wild in Tennessee than there are elk or mule deer. The reintroduction of twenty-five elk into the Cataloochee Valley is not comparable to maintaining a commercial herd of white-tailed deer.[41]

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[39]One of the plaintiffs' experts testified that the USDA had validated a tonsil biopsy test that could be performed on live elk to determine whether they had contracted CWD. Even though the State's expert questioned the existence of this test, the plaintiffs' own expert has provided a factual basis for distinguishing elk from white-tailed deer.

[40]The Commerce Clause does not obligate the States to develop testing procedures to detect CWD in live white-tailed deer. In upholding Maine's prohibition against the importation of live bait fish, the United States Supreme Court observed that the state "is not required to develop new and unproven means of protection at an uncertain cost." *Maine v. Taylor*, 477 U.S. at 147, 106 S. Ct. at 2452.

[41]The program is a cooperative effort between the Rocky Mountain Elk Foundation, Parks Canada, U.S. Forest Service, Land Between the Lakes, Tennessee Conservation League, Campbell County Outdoor Recreation Association, (continued...)

These elk where taken from herds in Elk Island National Park that had been under observation since 1930, and they are carefully monitored from the ground and from airplanes and are restricted to a "restoration zone." In these circumstances, the reintroduction of a small number of elk to the wild is not comparable with a commercial white-tailed deer farm.

IV.

In summary, we have concluded that the persons asserting that Tenn. Code Ann. § 70-4-403(4)(B) unconstitutionally burdens interstate commerce have failed to demonstrate that the statute discriminates against interstate commerce or that its incidental burdens on interstate commerce are clearly excessive in relation to the benefits it provides by protecting the health of Tennessee's indigenous white-tailed deer. Accordingly, we affirm the judgment and remand the case to the trial court for whatever further proceedings may be required. We tax the costs in equal proportions to the State of Tennessee and to Messrs. Robert Bean, Franklin Shaffer, David Autrey, and Mack Roberts, jointly and severally, and their surety, for which execution, if necessary, may issue.

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WILLIAM C. KOCH, JR., P.J., M.S.

[41](...continued)
and the University of Tennessee. TWRA, *2004 Tennessee Hunting & Trapping Guide*, *available at* www.tnwildlife.org (regulations apply from August 1, 2004 through July 31, 2005).